Why do Canadian courts still allow the 'gay panic' defence?

An Ontario court's decision to consider 'provocation' in a murder case is a Criminal Code vestige of days gone by, says one legal scholar

By Justin Ling
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Xtra

"I love you."

Robert Nicholson stumbled over to Sebastien Bouchard and kissed him on the neck.
The two were drunk, stoned and stumbling arm-in-arm down a rural road in Lancaster, Ontario. Nicholson's nose was bleeding — he had put his hand on Bouchard's thigh while Bouchard was driving and got a fist to his nose for the trouble. Bouchard drove Nicholson's truck into a ditch a minute later.
So the two left the truck and wandered up the road, in the general direction of Bouchard's house.
Nicholson's affection for his straight friend was overflowing that night. They had been drinking all day, after all. But Bouchard brushed off his older friend's advance and they staggered on.
But when Nicholson gave him that kiss, it was too much for Bouchard. He threw his friend to the ground and stomped on him until Nicholson stopped moving.

Bouchard then stumbled onward, back home. His mother made him a cup of tea as he washed the blood off his boots. Meanwhile, Nicholson lay there, on the side of the road, a few kilometres away from the truck they'd abandoned. His windpipe was nearly crushed. The temperature hovered around minus six degrees Celsius; it snowed lightly.
Nicholson's body was found the next day. Police couldn't identify it; his face was beyond recognition.

"I lost it"

A jury sentenced Bouchard to life in prison in 2009, with eligibility for parole after 15 years.
At trial, his defence lawyers tried to paint a picture of a temporary lapse of control — on that drunken December night in 2005, he testified, his friend's drunken kiss brought him back to abuse he suffered at the hands of a childhood babysitter. He snapped, he said, and didn't know what he was doing until it was too late. He left Nicholson there, he told the jury, thinking him injured but not dying. "I know I lost it. I didn't know what I was doing. At one point he was — he had me, he was on my side and the next point he was on the floor and I stomped him," the transcript of his testimony reads.
The defence made the case that Bouchard was guilty of manslaughter, not murder, and that Nicholson's advances proved the catalyst for his beating. To do so, they dug into a centuries-old provision in the Criminal Code that says that, in the case of murder, if the accused can demonstrate that an insult or act provoked his actions, he's not guilty of murder.

The Crown fought back, pleading to the judge that such a defence is ludicrous — that it has no "air of reality."
The judge rejected that and left the jury to grapple two questions: Did Bouchard either intend to kill Nicholson or know that his assault could have led to his death? If so, was it something that an ordinary person in his situation would have done?

On both of those questions, the judge told the jury to contemplate whether Nicholson's kiss had a role to play in Bouchard's actions. The jury decided that, yes, the attack constituted a murder and that, no, Bouchard did not act reasonably.
But Bouchard's lawyer, Howard Krongold, appealed.
In September of last year, three Ontario Court of Appeal judges heard that the original judge did not properly instruct the jury.
Krongold's case was a very technical one. He said that the judge was right to instruct the jury that they had to consider the definition of provocation in the Criminal Code: "a wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control."
But, he contended, the judge failed to instruct the jury that they could consider Bouchard's past as a contributor to his state of mind at the time. Mix in pot and alcohol, Bouchard's lawyer argued, as well as his flashbacks after being kissed by a man, and it is likely he didn't know what he was doing. It's what the courts call mens rea — a subjective test of the accused's state of mind at the time.

Two of the three justices hearing the appeal agreed: the judge should have been more explicit in telling the jury that they could have considered the "provocation" in a more subjective sense, rather than just under the language in the Criminal Code. In a ruling passed down at the end of December, they ordered a retrial.
The Crown filed notice to appeal that decision in January. That means the case will be sent to the Supreme Court, which might finally fulfill a long-held promise to axe the archaic defence. Or it might give Bouchard one more chance at freedom.

A very Victorian defence

Bouchard's defence is almost as old as the concept of manslaughter itself.
It dates back to the 16th century, when colonial England drew up a new concept of homicide that it exported to its possessions. Back then, the code provided that any man convicted of murder would be sentenced to death, while anyone not in his right mind at the time of the killing would survive in prison, under the crime of manslaughter.
By the middle of the 19th century, the idea of provocation had emerged — the court could save the accused from his end in the gallows by deciding that his actions were born out of human frailty. The three most common situations were a "chance medley," like a bar brawl; a husband coming home to find his wife in bed with another man; or a father discovering his son being sodomized by another man.

Eventually, rather than try to think of every circumstance where one might be provoked to kill, the courts instructed juries to consider what a "reasonable person" would have done under the same provocation — and that has essentially been the basis for that defence since 1892.
But that specific issue of sodomy as being a primally offensive act has never quite gone away.
Rather than modify the law to bring it into a contemporary context, where men no longer have dominion over their wives and where anal sex has been decriminalized, the courts widened its use. The Supreme Court, in 1986, held that the jury should take into account certain characteristics of the accused, like age, in considering whether a "reasonable person" would have acted in the same manner. By 1995, a Superior Court established that making aggressive "homosexual advances" constituted provocation for a violent stabbing — the accused, in that case, was sentenced to five years in prison.
When Ottawa and the provinces got together in 1997, they finally signalled an intent to fix the law. They surveyed as many cases as they could collect that employed provocation as a defence — they identified 115 but noted that it was only a fraction of the actual caseload.

Here's what they found: nearly half of those cases were domestic homicides in which a man killed a woman and claimed she provoked it; six percent were cases in which a woman killed her male partner. The rest of the crimes were male-on-male, with 16 of them (14 percent of the total cases) involving a man saying that the victim came on to him.

In a consultation paper published in 1998, the working group concluded that there are only two options: reform the provocation defence or abolish it.

Reforming the act, it suggested, could remove the objectionable elements — like "the misuse of provocation in cases involving non-violent homosexual advances" — while still preserving its limited benefits.

The report was farmed out to various organizations to solicit responses. Most were hesitant to abolish the defence outright, noting that it retains a purpose: for battered women to avoid life in prison if they retaliate against their abusive husbands.

A submission from the law reform committee of the Canadian Bar Association noted that the defence has its purposes but that it was "generally supportive of the policy goal of ensuring that behaviour motivated by stereotypes of sex, race, sexual orientation, age or disability not be considered 'reasonable' for the purposes of the defence."

After that, the issue seemingly never arose again on the national level. No further report was filed. The defence was never altered.

Provocation, meanwhile, has been employed consistently. Juries across Canada have regularly heard that a homosexual advance constituted a provocative or wrongful act that resulted in a homosexual's death — a death that, under the law, does not constitute murder.

Gay panic

Kyle Kirkup is a Trudeau scholar at the University of Toronto's Faculty of Law. He followed the Bouchard case and is preparing an upcoming paper on the provocation defence.

"What seems to be going on here is that everyone seems to proceed on the assumption that an ordinary heterosexual man may actually react violently to what the court calls a 'wet kiss,'" Kirkup says.

"The cases where this issue comes up, it almost invariably is two men, one is gay and one claims to be straight, they drink a lot of alcohol, something happens, the gay person ends up dead — and then the accused person says, 'He made some kind of a move on me.' That's the typical story you see again and again in these provocation cases."

Kirkup points out that the Supreme Court, of late, has signalled a move to limit the use of provocation as a defence for murdering a gay person who made a homosexual advance.

It's called "gay panic."

In the 2010 R v Tran case, where a husband murdered his wife's lover, the Supreme Court unanimously held that the wife's infidelity was not a reasonable provocation and that it was, in fact, second degree murder. Justice Louise Charron, in her judgment for the court, considered the defence and wrote that "it would not be appropriate to ascribe to the ordinary person the characteristic of being homophobic if the accused were the recipient of a homosexual advance."

But the Ontario Court of Appeal didn't cite Tran when it considered Nicholson's death.

Kirkup's upcoming paper makes the case that a fundamental contradiction has emerged in Canadian law and that, if the circumstances of the Bouchard case had been slightly different, his attack may well have been labelled a hate crime. "If you successfully make provocation, you reduce what would otherwise be second degree murder to

manslaughter, but then if you've been motivated by hatred based on someone's identity, that can actually be an aggravating factor," Kirkup says. "So it's sort of a contradiction."

Kirkup paints the section of the Criminal Code as an updated vestige of days gone by, when "manly honour" was the primary concern of the legal system.

"I always think about if we existed in a society where every time a woman received an unwanted sexual advance, she murdered the man — the streets would be littered with heterosexual men."

Eliminating provocation

Canada remains an outsider when it comes to the provocation defence. Over the past decade, sister provisions in other Commonwealth countries have become scarce.

New Zealand abolished its provocation statute in 2009, following two successful uses of the defence, including one in which a gay man had a banjo violently rammed down his throat until he died. The jury accepted that the "homosexual advance"was a valid defence.

Several states in Australia have abolished the defence, with two others mandating that it cannot be used in the "gay panic" defence and another considering its removal.

The United Kingdom abolished the statute in 2010 but replaced it with a similar, but more limited, concept of "lack of control" — where those accused need to make the case that they had the "justifiable case of feeling wronged." That does not include, however, adultery.

Canada is in league with the English Caribbean and parts of Commonwealth Africa in not touching the language of the law since its implementation in 1892.

While the Court of Appeals and the Supreme Court have been more stringent in allowing the defence, the lower courts have had a mixed record on allowing provocation to be applied. Until the Supreme Court offers an entirely clear ruling on its use, it appears as though that will continue to be the case. Unless, of course, the federal government steps in and changes the law.

The Justice Department, though, currently has no plans to do so.